

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CIVIL APPELLATE JURISDICTION****SECOND APPEAL NO. 351 OF 2017****ALONG WITH****CIVIL APPLICATION NO. 756 OF 2017**

Abbas Babu Mulani and others

...Appellants

Vs.

Bakas Ibrahim Mulani, since deceased
through LRs

....Respondents

*Mr. Pradeep Gole for the Appellants/ Applicants.**Mr. Bhushan Walimbe for the Respondent Nos. 1A to 1F.***CORAM: S. J. KATHAWALLA, J.****DATE: 14th September, 2017****P.C.:**

1. The Respondents herein (Original Plaintiffs) filed Regular Civil Suit No. 490 of 1989 before the 5th Joint Civil Judge, Junior Division, Islampur seeking an injunction restraining the Appellants (original Defendants) from causing obstruction to the possession of the Respondents over the suit land. The Respondents had thereafter amended the plaint and in the alternative sought possession of the suit property. Vide judgment and order dated 23rd December, 2010, the suit was partly decreed by the learned 5th Joint Civil Judge, Junior

Division, Islampur and the Appellants were directed to hand over vacant possession of the suit land to the Respondents. The counter claim filed by the Appellants was dismissed.

2. Being aggrieved by the judgment dated 23rd December, 2010 passed by the 5th Joint Civil Judge, Junior Division, Islampur, the Appellants filed Regular Civil Appeal No. 21 of 2011 before the Court of District Judge-3, Islampur at Islampur, Dist. Sangli which is also dismissed. Being aggrieved therefrom, the Appellants have filed the present Second Appeal before this Court under Section 100 of the Code of Civil Procedure, 1908.

3. For the sake of convenience, the Appellants and the Respondents are referred to hereinafter as per their original status i.e. Defendants and Plaintiffs.

4. It is the Plaintiffs case in the Suit that the land bearing Gat No. 2170 admeasuring 27-R assessed at Rs. 3.25 situated at Mouje Yedenipani, Tal. Walwa (suit land) is 'inam land' and re-granted to the Plaintiffs on new restricted tenure. The Plaintiffs are cultivating the suit land by visiting from Shirala since about 32 years and taking crops in the suit land. The Defendants have no concern with the suit land. Since the Defendants are Bhaubands of the Plaintiffs, they had close relations and therefore, the Plaintiffs were giving money to the Defendants for paying land revenue of the suit land. Since the Plaintiffs

trusted the Defendants, they had not verified the record of the suit land. However, prior to the filing of the suit, when the Defendants started obstructing the Plaintiffs possession over the suit land by claiming that their names are recorded in the records pertaining to the suit land and also threatened to obstruct them from taking crops in the suit land, the Plaintiffs obtained the record pertaining to the suit land and found that the names of Defendants were recorded in the cultivation column of the 7/12 extract of the suit land. According to the Plaintiff, the said entries were made by the Defendants in collusion with the village Talathi taking undue advantage of the fact that the Plaintiffs were residing in the other village. According to the Plaintiffs, the said entries were not binding on the Plaintiff. The Plaintiffs also came to know that the Defendants had taken a loan from Banks on the basis of 7/12 extracts which were illegally procured. The Plaintiffs therefore filed the suit for injunction restraining the Defendants from causing obstruction to his possession over the suit land.

5. During the pendency of the suit the Plaintiff amended the plaint and stated that the Defendants have taken possession of the suit land and in the alternative sought directions against the Defendants to hand over the same to the Plaintiffs on the basis of title.

6. The Defendant Nos. 2 and 4 contested the suit by filing written statement wherein they denied all the allegations made by the Plaintiffs in the plaint. They admitted that the suit land was Inam land of Plaintiff's father and it was re-granted. According to the Defendants, in the year 1947-48, the Defendants father Abdul Bapu Mulani had obtained the suit land from the Plaintiff's grand mother Ajmatbi Babalal Mulani on tenancy basis. Since then the suit land is in possession of the Defendants in the capacity of tenant and their names are recorded in the records pertaining to the suit land. In fact, Defendant's father was a tenant in respect of the suit land on 1st April, 1957 as per mutation entry No.7846, however, his name was illegally deleted by mutation entry No.8828. The names of Defendants and their father are recorded in the cultivation column of the suit land which shows that the Plaintiff is not in possession of the suit land.

7. After the Plaintiffs amended the plaint, the Defendants filed an additional written statement and submitted that they are in possession of the suit land in the capacity of tenant and therefore Plaintiffs have no right to claim possession of the suit land. They contended that the Court has no jurisdiction to hand over possession of the suit land and prayed for referring the issue pertaining to tenancy to the Agricultural Land Tribunal.

8. During the pendency of the suit, the original Plaintiff died and his legal heirs were brought on record. The trial Court framed the issue in respect of the tenancy of the Defendants vide Exh. 57 and referred the same to the Agricultural Land Tribunal, Islampur which was registered as Tenancy Reference No. 70 (b)/371/2001. The Tribunal after an inquiry in the matter declared that the Defendants are not the tenants of the suit land and accordingly answered the reference in the negative. The Defendants challenged the said order by filing Tenancy Appeal No. 15 of 2003 before the S.D.O. Walwa, who decided the Appeal on 18th March, 2004 and dismissed the same. Thereafter the Defendants preferred Tenancy Revision No. 100 of 2004 before the Member, Maharashtra Revenue Tribunal (MRT), Mumbai Camp at Pune. The MRT, Pune, decided the revision by judgment and order dated 18th September, 2009 and dismissed the revision. The Defendants preferred Writ Petition No. 647 of 2010 against the order passed by MRT, Pune in Tenancy Revision No. 100 of 2004 before this Court. By an order dated 23rd July, 2010, this Court observed that the Defendants had not established their rights as tenants on the basis of documents and consequently dismissed the Writ Petition. Thus admittedly the tenancy reference sent by the trial Court to the Tenancy Court was decided against the Defendants upto this Court and it was held that the Defendants

and/or their predecessors are not the tenants in the suit land.

9. Since the Defendants had come with the only defence that they are the tenants in possession of the suit land and the reference in respect of the tenancy rights of the Defendants being decided against the Defendants upto this Court, the trial Court held that the possession of the suit land with the Defendants cannot be treated as lawful possession and the Defendants are in possession of the suit land as trespassers. The trial Court therefore directed the Defendants to hand over possession of the suit land to the Plaintiffs and partly decreed the suit. The trial Court also held that since the Reference qua the tenancy was decided by the Tribunal the suit filed before the trial Court for possession was maintainable.

10. Being aggrieved by the decision of the trial Court, the Appellants/original Defendants filed an Appeal being Regular Civil Appeal N. 21 of 2011 before the District Judge-3, Islampur at Islampur, Dist. Sangli. The Defendants inter alia argued before the Appeal Court that since the Plaintiffs had not elected the relief in the course of the trial, they had no opportunity to make/raise their defence. The Defendants also argued that the trial Court had no jurisdiction to entertain and try the suit.

11. The first Appellate Court after holding that the party cannot be

prohibited from taking alternative and inconsistent pleas, by its detailed judgment dated 14th July, 2016, inter alia, held that the Plaintiff is alternatively entitled to claim possession of the suit land from the Defendants on the basis of title, that the Civil Court had jurisdiction to try and entertain the suit and no interference is necessary by the Appellate Court in the judgment and decree passed by the trial Court (Point Nos. 7, 8 and 9 respectively). Paragraphs 28, 29 and 30 of the said judgment are relevant and are reproduced herein.

“28. In this case the Plaintiff has claimed recovery of possession of the suit land on the basis of title by making amendment in the plaint. Admittedly, the plaintiff is the owner of the suit land. The defendants have come with the only defence that they are in possession of the suit land in the capacity of tenant. However, they have failed to establish their tenancy right before the competent authority and it is ultimately held that the defendants are not tenants in the suit land. The plaintiff has claimed possession of the suit land on the basis of title as per Section 5 of the Specific Relief Act. As per Article 65 of the Limitation Act, the period of limitation for a suit on the basis of title is 12 years and the time runs when the possession of the defendants become adverse to the Plaintiff. In a suit on the basis of the title the plaintiff need to prove only his title. Admittedly the plaintiff is the owner of the suit land and the defendants have not claimed adverse possession against the Plaintiff. The defendants have failed to establish their tenancy right before the competent authority. Therefore, even if the defendants are presumed to be in possession of the suit land since prior to the filing of the suit, their possession is of a trespasser. The question whether the plaintiff has lost the possession of the suit land before filing of the suit or after filing of the suit is immaterial. The plaintiff has claimed possession of the suit land on the basis of title and the title of the plaintiff over the suit land is admitted. In order to protect the possession the Defendants they have to prove better title than the plaintiff. As the defendants have failed to prove their

tenancy right in the suit land before the competent authority the plaintiff is entitled for recovery of possession of the suit land on the basis of title. Hence, the Plaintiff is entitled to recovery of possession of the suit land. Hence, I answer point No. 7 in the affirmative.

29. The plaintiff has claimed recovery of possession of suit land on the basis of title. The defendants have failed to establish their tenancy right in the suit land before the competent authority. The suit is under Section 5 of the Specific Relief Act. Therefore, it cannot be said that civil court has no jurisdiction to try and entertain the suit. As the Defendants have failed to prove their alleged tenancy right in the suit land before competent authority, the suit is not maintainable in Civil Court. Hence, point No. 8 is answered in the affirmative.

30. Considering the judgment and decree passed by learned trial Court it appears that the learned trial Court has granted the alternative relief of recovery of possession to the Plaintiff on the basis of title. Admittedly the Plaintiff is owner of suit land and Defendants have failed to establish their tenancy right in the suit land. Therefore, the finding recorded by learned trial Court cannot be said to be perverse. The learned trial Court has rightly appreciated the evidence on record and rightly decreed the suit for possession of plaintiff and dismissed the counter claim of Defendants. The defendants had an opportunity to take any defence and lead evidence but the defendants have not availed said opportunity. Therefore, the contention of the defendants that as the Plaintiff had not elected any of the relief in the course of trial, they had no opportunity to make their defence is not sustainable. Considering the evidence on record and the facts and circumstances of the case it is not necessary to interfere in the judgment and order passed by the learned trial Court. Hence I answer Point No. 9 in the negative.”

12. Being aggrieved by the judgment dated 14th July, 2016, passed by the first

Appellate Court, the Appellants (Original Plaintiffs) have filed the above Second Appeal under Section 100 of the Code of Civil Procedure, 1908.

13. The Learned Advocate appearing for the Appellants has reiterated the same submissions made before the trial Court as well as the Appellate Court which have been rejected by both the Courts below. Considering the facts as well as the settled law in regard thereto, in my view, no substantial question of law is raised in the Second Appeal and the same is dismissed. Civil Application is also accordingly disposed off.

(S.J. KATHAWALLA, J.)